STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	)	
On Its Own Motion	)	
v.	)	Docket No. 11-0434
Commonwealth Edison Company ,	)	
Respondent	)	
	)	
Investigation of Rate GAP pursuant	)	
to Section 9-250 of the Public Utilities Act	)	

THE ILLINOIS COMPETITIVE ENERGY ASSOCIATION'S SUGGESTED PARTIAL DRAFT ORDER

I. BACKGROUND

On March 3, 2011, and to enable pending municipal aggregation activity as authorized in Section 1-92 of the Illinois Power Agency Act ("IPA Act"), Commonwealth Edison Company ("ComEd") filed a tariff, i.e., Rate GAP - Government Aggregation Protocols ("Rate GAP"). This tariff became effective April 17, 2011.

Thereafter, on May 18, 2011, the Illinois Commerce Commission ("Commission") entered an *Order Initiating Investigation* that began the instant proceeding ("*Initiating Order*"). A Staff report, which was the basis for the Commission's action and made a part of record, outlined several issues for consideration with respect to Rate GAP. These issues included the construction to be given to the term "small commercial retail customer;" the appropriate universe of customers whose information will be provided to the GA; and questions regarding the sufficiency of protections and safeguards in terms of persons who may gain access to customer information during the course of the aggregation process. *Staff Report* dated May, 2011, filed May 20, 2011.

The matter came before a duly appointed Administrative Law Judge ("ALJ") at the Commission. Petitions to Intervene were filed by the FirstEnergy Solutions Corp. ("FES"); Rock River Energy Services, Co. ("RRES"); Retail Energy Supply Association ("RESA"); Dominion Retail, Inc. ("Dominion"); Illinois Competitive Energy Association ("ICEA"); the People of the State of Illinois ("People" or AG"); the Illinois Energy Professionals Association ("ILEPA"); MC Squared Energy Services LLC; BlueStar Energy Solutions; Interstate Gas Supply, Inc.; Verde Energy USA Illinois, LLC; and the Illinois Power Agency ("IPA"). Each petition was granted by the ALJ. Further, the Staff of the Commission ("Staff") was an active participant in the proceeding.

Through a series of workshops led by Staff, the parties met regularly to discuss and refine the issues. While progress was made resolving certain matters, other items remained in dispute.

At a status hearing held on November 15, 2011, the ALJ set a schedule (agreed to by the parties) for the filing of verified comments. In accord therewith, ComEd filed Initial Comments on November 28, 2011. Staff, ICEA, RESA, RRES, Dominion, ILEPA, the People, and Verde Energy filed their respective Initial Comments on December 29, 2011.

Thereafter, reply comments were filed on January 12, 2012 by FES", RRES, Staff, RESA, Dominion, ICEA, and the People. Finally, on January 19, 2012, ComEd filed its reply comments.

II. THE LAW

Section 1-92 (c)(2) of the IPA Act provides that:

> Notwithstanding Section 16-122 of the Public Utilities Act and Section 2HH of the Consumer Fraud and Deceptive Business Practices Act, an electric utility that provides residential and small commercial retail electric service in the aggregate area must, upon request of the corporate authorities or the county board in the aggregate area, submit to the requesting party, in an electronic format, those account numbers, names, and addresses of residential and small commercial retail customers in the aggregate area that are reflected in the electric utility's records at the time of the request. Any corporate authority or county board receiving customer information from an electric utility shall be subject to the limitations on the disclosure of the information described in Section 16-122 of the Public Utilities Act and Section 2HH of the Consumer Fraud and Deceptive Business Practices Act, and an electric utility shall not be held liable for any claims arising out of the provision of information pursuant to this item (2).

All of issues before us arise from the interpretation of the language set out in this particular statutory provision. 20 ILCS 3855/1-92 (c)(2).

III. THE ISSUES

A. Meaning of the Term "Small Commercial Retail Customer."

Section 1-92 of the IPA Act provides that the aggregation program is available for "residential and small commercial retail customers." 220 ILCS 3855/1-92(a). The statute, however, does not define the term "small commercial retail customers." Our Initiating Order outlined Staff's belief that a substantial question exists as to whether Rate GAP applies to the appropriate subset of ComEd's commercial customers. *Initiating Order* at 2.

1. ComEd's Position

2. Staff's Position

3. RESA's Position

4. ILEPA's Position

5. RRES's Position

6. AG' Position

7. ICEA's Position

ICEA explains that the task of bringing definiteness and uniformity to the term "small commercial retail customers" is effectively assigned to the Commission. Further, ICEA asserts that the term in question has acquired meaning given that the General Assembly expressly set out a definition in Section 16-102 of the Public Utilities Act ("PUA") and that the Commission has adopted this very definition in its Order for the Part 412 rules. ICEA maintains that this law is definite and certain in stating that:

> "Small commercial retail customer" means those non-residential retail customers of an electric utility consuming 15,000 kilowatthours (kWh) or less of electricity annually in its service area. 220 ILCS 5/16-102.

It is to be presumed, ICEA asserts, that the General Assembly has knowledge of the PUA's definition of the term and intends consistency between the statutes. Just as well, ICEA maintains, it is reasonable to believe that the General Assembly intended that the Commission would supply a definition of the term, consistent with the PUA and the *in pari materia* rule, to cure any vagueness in the law.

ICEA notes that nearly all of the commenters agree that the term "small commercial retail customer" in Section 1-92 of the IPA Act should be interpreted in accord with the definition set out in Section 16-102 of the PUA. Only RRES takes a different view. But, ICEA points out, this party fails to provide any legal analysis for its position or for its view that the term should embrace the Small 0-100 KW class. ICEA reminds that what the Commission has before it is a question of law. Matters of statutory construction and application are not matters of personal belief or preference, ICEA argues. To the contrary, settled principles of interpretation must be consulted and relied on. ICEA maintains that RRES offers nothing in this regard.

8. Analysis and Conclusion

The Commission remains mindful that it is construing language that resides in the IPA Act and not in the PUA. Yet, we observe that Section 1-92 of the IPA Act uses the term "small commercial retail customer" that is not defined.

In their respective comments and for a variety of reasons, Staff, RESA, ILEPA, ICEA, and the AG urge the Commission to follow the definition of "small commercial retail customers" that appears in Section 16-102 of the PUA to define the universe of non-residential customers that may be subject to the aggregation programs. While ComEd does not necessarily believe that the term "small commercial retail customer" as used in Section 1-92 of the IPA Act is tied to the Section 1-102 PUA definition, it gives statistical reasons for not opposing limiting its provision of data for non-residential customers to those having usage of 15.000kWh per year or less. Only RRES disputes the use of the PUA's definition and sets out certain policy-type arguments in favor of keeping the definition currently found in Rate GAP.

To determine how the term in question should be construed, the Commission must be guided by established statutory construction principles. ICEA directs us to the doctrine of *in pari materia.* The rule of *in pari materia* is generally used when there is some doubt or ambiguity in the wording of the statute under consideration. 2B N. Singer, Sutherland Statutes and Statutory Construction §51:3 at 240 (7th ed. 2008). Under this doctrine of construction, two legislative acts that address the same subject are considered with reference to one another. *Land v. Board of Educ. of City of Chicago*, 202 Ill.2d 414, 781 N.E. 2d 249 (2002); *Nussbaum Trucking v. Illinois Commerce Commission*, 99 Ill.App.3d 741, 425 N.Ed.2d 1229 (2nd Dist.1981) (observing that the PUA and the Illinois Motor Carrier of Property Law are *in pari materia* and should be construed together to determine legislative intent). It is well-settled that characterization of the "object or purpose" is key to determining whether different statutes are "closely enough related" to justify interpreting one in light of the other. 2B N. Singer, Sutherland Statutes and Statutory Construction §51:3 at 240 (7th ed. 2008).

We observe that Article 16 of the PUA is titled the Electric Service Customer Choice and Rate Relief Act. Staff informs that this law regulates both electric utilities and RESs as Illinois moves towards competitive wholesale and retail markets that benefit all Illinois citizens. Section 1-92 is designed to move residential and small commercial retail customers into competition through a particular vehicle. As ICEA points out, the ongoing development of municipal aggregation authorized by Section 1-92 is yet another way for the competitive market to continue to develop in Illinois. From this analysis, it is obvious that Article 16 of the PUA and Section 1-92 of the IPA Act were each designed to serve the same objective and purpose. Moreover, as Staff notes, there is nothing in the provisions of Section 1-92 that would conflict with the definition of "small commercial retail customer" found in Section 16-102 of the PUA. For these reasons, we find that the PUA is "closely enough related" to Section 1-92 of the IPA Act for the Commission to apply the Section 16-102 definition of "small commercial retail customer" to the situation at hand.

In a similar vein, ICEA asserts that it is to be presumed that the General Assembly has knowledge of the PUA's definition of the term and intends consistency between the statutes. We observe that the Illinois Supreme Court holds to that very view. *Harvel v. City of Johnston City,* 146 Ill. 2d 277, 586 N.E. 2d 1217, 1222 (1992) ("It is assumed that whenever the legislature enacts a provision it has in mind previous

statutes relating to the same subject matter....[t]hus they should be construed together." (quoting *Sutherland on Statutory Construction,* Section 51.02 at 453 (4th Ed. 1984)). There is more than an assumption in the situation at hand. Our review of Section 1-92 shows that the General Assembly was more than cognizant of Article 16 of the PUA when it drafted the statute. This is so because Section 1-92 itself specifically references certain provisions of the PUA, i.e. Section 16-103 and Section 16-122. Thus, it is clear that by adopting the definition of "small commercial retail customer" found in Section 16-102 of the PUA for purposes of defining the same term in Section 1-92 we are meeting with the intent of the General Assembly.

On these grounds and as a matter of law, we conclude that the term "small commercial retail customer" for purposes of Section 1-92 of the IPA Act means exactly that which Section 16-102 provides in its definition of the same term.

While our decision rests on statutory construction law, the Commission does take note of the statistical analyses presented in this proceeding by both Staff and other commenters. There we find nothing to suggest that defining "small commercial retail customer" for the IPA Act's purpose would lead to an absurd result.

B. Extent of ComEd's Obligations Re: Customer Data

As noted in our Initiating Order for this proceeding, there is a concern that Rate GAP does not appropriately limit the universe of customers whose information ComEd will provide to local governments operating aggregation programs. *Initiating Order* at 2.

In relevant part, Section 1-92(c) of the IPA Act provides that:

> an electric utility that provides residential and small commercial retail electric service in the aggregate area must, upon request of the corporate authorities or the county board in the aggregate area, submit to the requesting party, in an electronic format, those account numbers, names, and addresses of residential and small commercial retail customers in the aggregate area that are reflected in the electric utility's records at the time of the request. 20 ILCS 3835/1-92(c)(2).

1. ComEd's Position

2. Staff's Position

3. Dominion's Position

4. RESA's Position

5. FirstEnergy's Position

6. The AG's Position

7. Verde Energy's Position

8. ILEPA's Position

9. RRES's Position

10. ICEA's Position[1]

Within the context of the whole of Section 1-92 of the IPA Act, and the law's purposes, ICEA maintains that the most reasonable interpretation of the term "retail customers" in subsection (c)(2) of the statute means those utility customers receiving bundled service. According to ICEA, the construction that ComEd urges is broader than necessary to implement governmental aggregation and, as such, is not consistent with the subject matter, purposes or intents of Section 1-92 of the IPA Act. Where as here, different interpretations are urged, ICEA observes that a court must look to reasons for the enactment of the statute and the purposes to be gained by it and construe the statute in the manner which is consistent with such purpose. 2A N. Singer, Sutherland Statutes and Statutory Construction §46:7 at 258 (7th ed. 2007).

At a high level, ICEA explains, Section 1-92 of the IPA Act is yet another way by which the state is attempting to bring the benefits of retail electric supply competition to residential and small commercial customers. In all likelihood, however, there will be consumers in an aggregating area that have already availed themselves of existing retail choice opportunities and have entered into contracts with an ARES for energy supply. Nothing in Section 1-92 of the IPA Act, ICEA points out, shows the General Assembly to have intended to interfere with any existing contracts between those customers and the ARESs they have chosen.

ICEA questions ComEd's assertion that all electricity customers take delivery service from ComEd, including RDS customers, and for this reason are retail customers of ComEd. In ICEA's view, this simplistic argument overlooks the very subject matter of the statute at hand. As ICEA observes the law's subject matter and purposes, it is apparent that only the electric supply of utility customers matters. It is abundantly clear, ICEA argues, that both the opt-out and the out-in programs that Section 1-92 of the IPA Act authorizes are solely concerned with electric supply. If delivery service is not of interest or material to the purposes of the aggregation plan, ICEA asserts that the confidential and competitively-sensitive information of delivery services-only customers is of no relevance. Stated another way by ICEA, "delivery service only" retail customers of ComEd are outside the scope of the law.

ICEA notes Staff to rely on Section 16-102 of the PUA which defines a "retail customer" in relevant part, as:

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[1] On this issue, ICEA member FES does not support the ICEA position and has chosen to proceed separately before the Commission.

> a single entity using electric power or energy at a single premises and that...is receiving or is eligible to receive tariffed services from an electric utility. 220 ILCS 5/16-102.

The words of Section 16-102, standing alone, are general and indefinite, ICEA claims, and thus do not unequivocally lead to the conclusion advanced by Staff. ICEA maintains that, as with many statutes, the definition in Section 16-102 is the broadest that it can be for reasons that it will be applied in a number of different situations and circumstances. In this instance, when dealing with the use of the term in Section 1-92, ICEA avers that the Commission must read the statute as a whole and with attentiveness to the purposes and intents expressed therein.

ICEA notes that Section 1-92 (c)(2) requires an electric utility that provides "residential and small commercial retail electric service" in the aggregate area to provide names, addresses, and account numbers of residential and small commercial retail customers in that area that are reflected in the electric utility's records. 20 ILCS 3855/1-92. Without question, ICEA asserts, the General Assembly is, here, flatly concerned with those customers obtaining "electric service" from the utility, i.e., its bundled customers. ICEA here calls attention to the maxim of *noscitur a sociis*, which in statutory construction holds that the meaning of doubtful words may be determined by reference to their relationship with other associated words and phrases. 2A N. Singer, Sutherland Statutes and Statutory Construction § 47:16 at 347-8 (7th ed. 2007). According to ICEA, a textual interpretation of Section 1-92 will have the Commission limit the customer information being provided by ComEd to the intended beneficiaries of the statute, i.e. bundled electric customers.

ICEA points out that considering the effect and consequences of interpreting a statute one way or another is an important undertaking for the Commission. Without question, ICEA asserts, RES customer information is highly confidential and competitively-sensitive. As the statute is currently written, and as even ComEd itself recognizes, there are substantial and fatal gaps in the protections and safeguards afforded this information. Notably, ICEA observes, the potential for mischief, i.e., an absurd result, arises only if "retail customer" is construed in the broadest possible way and inconsistently with the law's purposes. Authority cautions that, if the literal import of the text of an act is inconsistent with the legislative meaning or intent or would lead to absurd results, the words of the statute will be construed to agree with the intent of the legislature. 2A N. Singer, Sutherland Statutes and Statutory Construction §46:7 at 253-7 (7th ed. 2007). Where, as here, it is shown that providing the names of customers already with a RES is simply unnecessary for the law's purposes, ICEA maintains that there is no reason to put this confidential and competitively-sensitive information at risk.

ICEA agrees with Verde Energy's observation that the practicality arguments (e.g. full customer lists provided to Governmental Authorities in order to help in informing their citizens and responding to questions) set out as reasons for providing the Governmental Authority with all of ComEd's confidential customer information are

not convincing. ICEA believes Verde Energy is correct in noting that Governmental Authorities have ample opportunities and ways to inform and educate their citizens. Some have already fashioned outreach efforts that include public meetings, two statutorily-required public hearings, surveys, press releases, news articles and even the creation of a energy committee. At best, in ICEA's view, there may be an extra convenience to having the Governmental Authority take possession of the customer data that is irrelevant to its mission. But, ICEA asserts, mere convenience does not trump law. Nor does it outweigh the clear and present risk of putting out confidential RES customer information that is wholly superfluous for the law's purposes.

Above all, ICEA submits, statutes need to be construed sensibly. In the instance of municipal aggregation as provided for under Section 1-92 of the IPA Act, the General Assembly clearly intended the reach of aggregation to be limited to the electric utility's own commodity customers. As such, ICEA notes, the law does not require ARESs to provide customer data for their customers to the Government Authorities. In the same vein, ICEA asserts, Section 1-92 (c)(2), when reasonably read, does not require ComEd to provide confidential RES customer information to the Governmental Authority. Only the names, addresses and account numbers of the utility's bundled customers need be provided. ICEA asks the Commission to define "retail customer in this way and direct appropriate revisions to be made to Rate GAP.

11. Commission Analysis and Conclusion

Section 1-92 of the IPA Act does not include a definition for the term "retail customers." From all of the comments put before us, the Commission is compelled to acknowledge that the term is ambiguous. Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses. 2A N. Singer, Sutherland Statutes and Statutory Construction § 45:2 at 13 (7th ed. 2007). Here, ComEd, Staff, the AG, FES, and RRES would have the term "retail customer" be construed to have the electric utility provide the names and addresses of the customers within the Governmental Authority's jurisdiction, regardless of their source of energy supply.

On the other hand, ICEA, RESA, Dominion, ILEPA, and Verde Energy view the statutory language differently. These commenters maintain that the term "retail customer" is intended to mean the electric utility's bundled customers such that RES customer data need not be provided to the aggregating authority.

Whether the term "retail customer" in Section 1-92 of the IPA Act means the utility's bundled customers or also those customers only taking delivery service, is a matter of statutory construction and a question of law for the Commission to determine. Our singular task in this instance is to determine what the General Assembly intended by its use of the term "retail customer." We are guided by the primary rule in statutory construction which is to ascertain and give effect to the intention of the legislature. *Land v. Board of Educ. of City of Chicago*, 202 Ill.2d 414, 781 N.E. 2d 249 (2002). The

Commission begins now to consider the arguments of the parties together with the settled rules of statutory interpretation.

a. The PUA definition

We observe Staff to assert that that the term "retail customer" is defined in the PUA and, as such, it proposes that the Commission apply that definition in these premises. It would be consistent, Staff argues, for the Commission to use the definitions for both "small commercial customer" and "retail customer" as these terms are each defined in Section 16-102 and Section 16-115 (a) of the PUA, respectively. The Commission is not persuaded.

We note that the doctrine of *in pari materia*, highly useful in clearing up the ambiguity that surrounds the term "small commercial retail customer," does not apply in the same sense when we turn our attention to the meaning of the term "retail customer." This is because related statutes vary in probative value. 2B N. Singer, Sutherland Statutes and Statutory Interpretation § 51:1 at 199 (7th ed. 2008). It is obvious to the Commission that the definition of "retail customer" that appears in the PUA does not provide as definitive, specific or final a meaning for the term as Section 16-102 does provide for "small commercial retail customer." To the contrary, and as ICEA points out, the term "retail customer" is broadly defined in the PUA as it will apply to a number of different situations. In other words, unlike the definition of "small commercial retail customer," the definition of the term "retail customer" in the PUA does not stand alone. It needs a referent. This means that, for purposes of application, the PUA's definition must be construed together with the full text of Section 1-92 of the IPA Act including the statutes subject matter and purposes. This follows from the rule that two statutory provisions containing similar or identical language are not necessarily subject to the same interpretation, as there are other interpretive factors to consider such as the purpose and context of the legislation. 2A N. Singer, Sutherland Statutes and Statutory Construction §46:5 at 224 (7th ed. 2007).

b. Common meaning for the term

The Commission notes FES to suggest that the term "retail customer," in the electricity context, is widely understood to mean an end use customer and that this term applies to all portions of a customer's service, i.e., transmission, distribution, and supply, unless otherwise specified. Giving this term its commonly understood meaning as advocated by FES, however, compels us to note that while it certainly applies to the utility's customers, RES customers, being delivery customers only, are a subset neither specified in Section 1-92 nor understood from its provisions. It seems logical to the Commission, however, that if the General Assembly intended to include these two different groups in the definition of "retail customer" it would have stated so in the statute. We understand FES to be asserting the rule which states that the words in a statute are generally given their commonly understood meaning. 2A N. Singer, Sutherland Statutes and Statutory Construction §47:27 at 443 (7th ed. 2007). The same authority informs, however, that the customary meaning of words will be disregarded

when it is obvious from the act itself that the legislature intended they be used in a sense different from their common meaning. 2A N. Singer, Sutherland Statutes and Statutory Construction §46:1 at 156 (7th ed. 2007). Other commenters maintain just such an argument and thus, we proceed further with our analysis.

c. Context for the term in question

ICEA proposes that the Commission examine the relevant provision of Section 1-92 (c)(2) closely and again calls our attention to the maxim of *noscitur a sociis*. In this regard, ICEA points out that Section 1-92 (c)(2) requires an electric utility that provides "residential and small commercial retail electric service" in the aggregate area to provide names, addresses, and account numbers of residential and small commercial retail customers in that area that are reflected in the electric utility's records. 20 ILCS 3855/1-92. We understand ICEA to be asserting that when the term "retail customer" (referencing the provision of data) is read in context with the direction to an electric utility that "provides residential and small commercial retail electric service," it is shown that the General Assembly is only concerned with those customers obtaining "electric service" from the utility, i.e., its bundled customers. The Commission agrees that this advances the position advocated by ICEA and others. But, there is far more that we need to consider.

d. Subject matter and purposes

There is a presumption that the lawmaker has a definite purpose in every enactment and has adapted and formulated the subsidiary provisions in harmony with the purpose. That purpose is an implied limitation on the sense of general terms, and a touchstone for the expansion of narrower terms. This intention also affords the key to the sense and scope of minor provisions. From this assumption proceeds the cardinal rule that the general purpose, intent, or purport of the whole act shall control, and that all the parts be interpreted as subsidiary and harmonious to its manifest object, and if the language is susceptible of two constructions, one which will carry out and the other defeat such manifest object, it should receive the former construction. 2A N. Singer, Sutherland Statutes and Statutory Construction § 46:5 at 218-221 (7th ed. 2007).

Where, as here, different interpretations are urged, a court must look to the reasons for the enactment of the statute and the purposes to be gained by it and construe the statute in the manner which is consistent with such purpose. 2A N. Singer, Sutherland Statutes and Statutory Construction §46:7 at 258 (7th ed. 2007).

The subject matter and the purpose of the statute at hand is clear. Section 1-92 of the IPA Act authorizes the Governmental Authority to adopt an ordinance under which it may aggregate the retail electrical loads of the residential and small commercial customers within its respective jurisdiction, solicit bids, select a retail electric supplier ("RES") and enter into a service agreement for the purchase of electricity and related services and equipment. 20 ILCS 3855/1-92(a). This relatively new law, titled "Aggregation of electrical load by municipalities and counties," is yet another way by

which the state is attempting to bring the benefits of competitive retail electric supply to residential and small commercial customers.

We observe ICEA to point out that in light of its subject matter, only the electric supply of the utility's customers matters in carrying out the law's purposes. In ICEA's view, RES customer information is neither of interest nor is it material or relevant to the aggregation scheme that Section 1-92 authorizes. We note that ICEA is not alone in making these observations.

As other commenters point out, and as the Commission itself concludes from its review of the entirety of Section 1-92 of the IPA Act, nothing shows the General Assembly to have intended to interfere with any existing contracts between delivery service only customers and the ARESs they have chosen for their supply. This is an important consideration as the Commission moves forward with our analysis. We are persuaded, however, that the definition of the term "retail customer" ought not to be narrower or broader than necessary to implement governmental aggregation, consistent with the subject matter, purposes or intents of Section 1-92 of the IPA Act.

e. Whole act construction

The Commission draws meaning for the term "retail customers" by a reading of the Section 1-92 in its entirety, guided by the admonition that in construing a statute, every part must be considered together. *People v. Warren*, 800 N.E. 2d 700 (1996) *Behe v. Industrial Commission*, 848 N.E.2d 611 (2d Dist. 2006). A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. See 2A N. Singer, Sutherland Statutes and Statutory Construction §46:5 at 189 (7th ed. 2007).

We observe, as Dominion has noted, that the term "retail customer" appears some eleven (11) times in the whole of Section 1-92 of the IPA Act. The definition ascribed to the term must, of course, apply consistently throughout these statutory provisions. The same words used twice in the same act are presumed to have the same meaning. 2A N. Singer, Sutherland Statutes and Statutory Construction §46:6 at 249 (7th ed. 2007). According to Dominion, every single use of the term in the statute is clearly in the context of providing governmental aggregation opportunity to an electric utility's bundled customers, i.e., RES electric supply. We observe that where the meaning of a word is unclear in one part of a statute but clear in another part, the clear meaning can be imparted to the unclear usage on the assumption that it means the same thing throughout the statute. 2A N. Singer, Sutherland Statutes and Statutory Construction §47:16 at 357 (7th ed. 2007).

Just as well, the Commission observes that the full term being used, each and every time, is actually "residential and small commercial retail customer." By virtue of our sound *in pari materia* construction above, we define "small commercial retail customer" in part, as " nonresidential customers of an electric utility." Given that, as Dominion points out, a RES is not a utility, we are compelled to conclude that small

commercial RES customers are not intended for aggregation purposes. This strongly suggests to the Commission that confidential RES customer data need not be provided under the statute.

Having examined the whole of Section 1-92 (c)(2) of IPA Act, with due attention to its subject matter and purposes, the Commission now turns its attention to a final argument.

f. Results of different interpretations

Courts often consider the consequences of interpreting a statute one way or the other. This is based on the presumption that the legislature would not have intended an absurdity, hardship or injustice.

The Commission observes several commenters to assert that giving the term "retail customers" its broadest possible meaning raises the risk of competitive harm. On record, we see ICEA's concern that the GA's employment of third parties will give them access to competitively-sensitive information that could be misused by the third party to further their commercial interests outside of implementing the aggregation. Voicing similar concerns, RESA believes that its interpretation of the IPA Act's confidentiality provisions shows these laws to be inadequate and incomplete for the task. According to Dominion, the release of RES customer information could result in slamming--either inadvertent or intentional--by the RES that obtains this sensitive information from a Governmental Authority. ILEPA and Verde Energy state similar views. All of these arguments, effectively showing the Commission that the General Assembly did not properly provide necessary protections for the confidential and competitively-sensitive RES information, lead the Commission to only one conclusion. The reason that the General Assembly it did include proper and explicit protections for this particular type of customer information is because it did not intend RES customer information to be provided to the GA

We see that a whole set of problems attach when construing the term "retail customer" in the way that ComEd, Staff and others would have us do. In such a circumstance, the GA is not only getting confidential customer data of the utility's customers--it would be receiving competitively-sensitive data of RES customers. This is the type of data that we note ComEd to itself observe has insufficient restrictions provided for in the statute. Indeed, ICEA, RESA, ILEPA, Verde Energy, and Dominion are all gravely concerned that this information will be passed by the GA to third-party's without proper protections. We are to presume, however, that the legislature did not intend absurdity, inconvenience or injustice. *Michigan Avenue Nat'l Bank v. County of Cook*, 191 Ill.2d 493, 732 N.E.2d 528 (2000). The Commission is compelled to observe that a construction of the term "retail customer" that includes only the utility's bundled customers averts the problem altogether. Illinois courts have held that if the language of a statute admits of two constructions, one of which makes the enactment mischievous, if not absurd, and the other renders it reasonable and wholesome, the construction leading to an absurd result should be avoided. *Secco v. Chicago Transit Authority, 2*

Ill.App.2d 239, 119 N.E. 2d 471 (1st Dist. 1954). We believe that had the General Assembly intended the release of RES customer data, it would have specified the same and provided ample protections regarding its use. Nothing of the type appears in Section 1-92 (c)(2).

Where, as here, it is shown that providing the names of customers already with a RES is simply unnecessary to carry out the law's purposes, the Commission is compelled to agree that there is no reason to put this confidential and competitively-sensitive information at risk.

g. Conclusion

We recognize that there are many convincing arguments that would favor interpreting "retail customers" in a way that would have ComEd provide to the GA confidential and competitively-sensitive RES customer information in addition to the utility's bundled customer data that it is unquestionably required to provide. In essence, however, all these arguments go to matters of practicality, convenience and retaining the status quo. In the end, and Staff points out, the Commission must follow the law as written and irrespective of its opinion regarding the desirability of the results surrounding the operation of the statute. *Citizens Utility Bd. v. Ill. Commerce Comm'n,* 655 N.E. 2d 961, 969-70 (Ist Dist.1995). The General Assembly wrote what it intended and the Commission is required to have ComEd apply the law consistent with its intents and purposes. Thus, Rate GAP will be modified in application such that ComEd will only provide the GA with the customer data of those residential and small commercial customers that are receiving commodity service from the electric utility, i.e. its bundled customers.

C. Protection and Use of Confidential Data

The Initiating Order for this proceeding recognized that there were questions regarding the sufficiency of protections and safeguards in terms of persons who may gain access to customer information during the course of the aggregation process. Order Initiating Investigation at 3. In this proceeding, ComEd is proposing certain revisions.

The portion of Section 1-92 (c)(2) that is of concern here, states that:

> Any corporate authority or county board receiving customer information from an electric utility shall be subject to the limitations on the disclosure of the information described in Section 16-122 of the Public Utilities Act and Section 2HH of the Consumer Fraud and Deceptive Business Practices Act, and an electric utility shall not be held liable for any claims arising out of the provision of information pursuant to this item (2).

(NOTE: This Draft Order contains two (2) versions of ICEA's position and recommended analysis and conclusion depending on the way that the Commission were to decide Issue B. above. Alternative "A" applies if the Commission accepts ICEA's position on Issue B. In the event that ICEA's recommended proposed conclusion is rejected, then Alternative "B" below applies.)

[Alternative "A" Version]

1. ComEd's Position

2. Staff's Position

3. The AG's Position

4. ILEPA's Position

5. RESA's Position

6. RRES's Position

7. Staff's Position

8. FirstEnergy's Position

9. Verde Energy's Position

10. ICEA's Position

ICEA supports ComEd's proposed modification to Rate GAP as being reasonable and effective. That said, ICEA would still support the strengthening of Rate GAP language in the way that the AG recommends. In ICEA's view, this modification - adding the requirement of a sworn and notarized affidavit for the warrant - brings an important level of alertness and seriousness to the Governmental Authority's heavy duty of protecting confidential customer data.

11. Commission Analysis and Conclusion

In light of our decision on the proper interpretation of "retail customers" above, the Commission is persuaded that the language for modifying Rate GAP that ComEd proposes is largely sufficient. We note further, however, that Staff, ICEA and RESA agree that adding the language proposed by AG will strengthen the tariff.

We agree to this modification, which added to ComEd's language, will state that:

Any warrant from a Government Authority submitted in accordance with the provisions of this tariff must be submitted to the Company in writing by a responsible official of such Government Authority, in the form of a sworn and notarized affidavit, attesting to the truth of the statement contained in the warrant.

Modification: 1st Revised Sheet No. 410

[Alternative B. Version}

1. ComEd's Position

2. Staff's Position

3. The AG's Position

4. ILEPA's Position

5. RESA's Position

6. RRES's Position

7. Staff's Position

8. FirstEnergy's Position

9. Verde Energy's Position

10. ICEA's Position

If the Commission were to determine that ComEd may release RES customer data to the GA, ICEA asserts that there arises a compelling need for more specific controls relative to the dissemination and use of the confidential RES customer data. In the application of its provisions, ICEA maintains, this is just what Section 1-92 (c)(2) of the IPA Act reasonably requires.

ICEA submits that what is implicit in the language of the subsection (c)(2) of the IPA Act needs to be made explicit in the Rate Gap tariff, i.e., that entities other than the local governments gaining access to this confidential and competitively sensitive information will be held to appropriate and enforceable restrictions. As a practical matter, ICEA asserts, there are many tasks required to implement an aggregation program. While the GA may execute these tasks on its own, ICEA explains that it is far more likely that a third party—perhaps an ICC licensed agent, broker or consultant and/ or the "winning" RES selected by the municipality—will be involved to a large degree. ICEA's concern is ensuring that these third parties are not given unrestricted access to

competitively-sensitive information that could be misused by the third party to further their commercial interests outside of implementing the aggregation.

While ComEd's proposed language for Rate GAP is a good start, ICEA maintains that it is not enough to address the real risks at hand. ICEA points out that even ComEd recognizes that Section 1-92 of the IPA Act lacks appropriate restrictions on the use of data acquired from electric utilities. If reasonably construed, however, ICEA contends that the statute is sufficient to bring about certain necessary additions to Rate GAP. The General Assembly, being a "reasonable legislative body," ICEA asserts, would understand and expect that confidential and competitively-sensitive customer information being tendered by the electric utility to the GA be given necessary protection at each link in the chain of disclosure.

It is to be assumed, ICEA asserts, that the General Assembly intended a reasonable discretion be afforded to those construing and applying its provisions to put into effect, with particularity, what the statute reasonably intends. See generally, *Sangamon County Fair, Etc. v. Stanard*, 9 Ill. 2d 267, 137 N. E. 2d 487 (1956) (words in a statute spell out the framework of the legislative intent and leave the details to the reasonable discretion of the administrative officer who administers the law). Here, ICEA observes, the Commission is faced a strong showing that much needs to be done to protect and safeguard private, confidential and competitively-sensitive information that will, in all probability, be disclosed to entities beyond the GA.

According to ICEA, the GA lacks essential guidance at a time when it is assuming legal responsibilities that are new and unfamiliar. But, ICEA points out, the Commission has solid experience and an acquired sensitivity for construing confidentiality laws and addressing confidentiality concerns. It frequently addresses such matters when approving protective agreements and petitions seeking confidential treatment of information. In other words, the Commission well understands that private, confidential and competitively-sensitive customer information must be protected in a meaningful way.

As a practical matter, ICEA believes that some GAs will have experience with confidentiality protection laws, and thus put into their Plans and/or contracts (with both consultants and the winning supplier) appropriate provisions to both safeguard and enforce the strict confidentiality of customer information. Other GAs, however, perhaps being overwhelmed by the depth and breadth of the aggregation implementation process, or short on resources, may either inadvertently omit including such provisions or believe such confidentiality to be simply understood and not in need of a binding restrictions. In either case, ICEA believes that GAs would welcome guidance from the Commission on ways to effectuate their confidential obligations under Section 1-92 (c) (2) of the IPA Act.

Accordingly, ICEA proposes that the following italicized language be added to what ComEd has already proposed for Rate GAP:

To ensure compliance with the law, and particularly with regard to protecting customer-specific information described in Items 18 through 23 of the Company Obligations Section of this Rate GAP, the Government Authority will require, as a material condition to a contract or other written agreement with both the RES selected to procure the aggregated electric power and energy supply service to eligible customers within the boundaries of the Government Authority and with any third party it has engaged to assist in any aspect of the aggregation process, that there be established and followed appropriate protocols to preserve the confidentiality of customer-specific information and limit the use of such customer-specific information strictly and only to effectuate the provisions of Section 1-92 of the IPA Act. The GA will ensure that these protocols, at the minimum, reasonably limit the number of authorized representatives of the selected RES and any other third party who need access to the customer-specific information; provide that the RES or any third party will not disclose, use, sell, or provide customer-specific information to any person, firm or entity for any purpose outside of the aggregation program; and, acknowledge that the customer-specific information remains the property of the GA and that breaches of confidentiality will have certain, specified, and sufficient consequences.

ICEA further supports the strengthening of ComEd's proposed Rate GAP language in the way that the AG recommends. According to ICEA, this proposed modification--adding the requirement of a sworn and notarized affidavit for the warrant--brings an important level of alertness to the Governmental Authority's heavy duty of protecting confidential customer data.

11. Commission Analysis and Conclusion

Having determined that all of ComEd's customer data, including RES customer information, will be available to the GA, the Commission turns its attention to the concerns of preserving the confidentiality and restricting the use of the competitively-sensitive RES customer data.

ICEA, ILEPA, and RESA most prominently, are concerned that entities assisting the GA in the aggregation process, and thus gaining access to confidential RES customer data may use that information for improper purposes. In the view of these parties, ComEd's proposed modification language for Rate Gap is acceptable, but not sufficient to forestall the risk.

Here, we see that ILEPA asks the Commission to provide clarity in the situation by including a provision that specifically prohibits the customer information being provided by ComEd for any type of marketing or solicitation. ICEA and RESA each propose specific language embracing that idea and request the Commission to incorporate their respective proposals into Rate GAP.

The AG, too, has proposed additional language to be inserted into Rate GAP. That particular modification is supported by Staff, ICEA, and RESA. Only FES believes that the GA's submission of a sworn affidavit is unnecessary based on its view that municipality lacks any commercial motivation and that other existing rules may be enough. As such, FES directs our attention to Rule 451.40 which "requires an ARES to preserve the confidentiality of its customers' data" This rule, however, is not the answer that FES would have it be. By its very terms, the requirement speaks to an ARES protecting the confidentiality of "its" own customers' data - not the confidential data of an "other RESs' customers." It appears obvious, thus, that Rule 451.40 does not satisfy the concerns at hand.

The Commission has before it realistic concerns about the need to protect confidential and competitively-sensitive RES customer data that is being made available to the GA by ComEd during the aggregation process. Recognizing the legitimacy of these concerns, yet finding itself incapable of being the enforcement authority, ComEd is understandably resistant to putting more into Rate GAP than what it has proposed. We understand and appreciate ComEd's conservatism. Nevertheless, the Commission is amply persuaded that more needs to be articulated in these premises.

The Commission notes Staff and others to support the proposed revision to the Rate GAP tariff that is being proposed by the AG. We agree, and find that the language on 1st Revised Sheet No. 410 is to be modified in order to state that:

> Any warrant from a Government Authority submitted in accordance with the provisions of this tariff must be submitted to the Company in writing by a responsible official of such Government Authority, in the form of a sworn and notarized affidavit, attesting to the truth of the statement contained in the warrant.

Further, we observe that Staff sees no reason to object to having the language proposed by ICEA and RESA be added to the Rate GAP tariff. Staff simply asks us to consider a merger of these proposals, i.e., adding the last sentence of RESA's proposed language to the proposed language set out by ICEA's language. Doing so, we derive the following:

> To ensure compliance with the law, and particularly with regard to protecting customer-specific information described in Items 18 through 23 of the Company Obligations Section of this Rate GAP, the Government Authority will require, *as* a material condition to a contract or other written agreement with both the RES selected to procure the aggregated electric power and energy supply service to eligible customers within the boundaries of the Government Authority and with any third party it has engaged to assist in any aspect of the aggregation process, that there be established and followed appropriate protocols to preserve the confidentiality of customer-specific information and limit the use of such customer-specific information strictly and only to effectuate the provisions

> of Section 1-92 of the IPA Act. The GA will ensure that these protocols, at the minimum, reasonably limit the number of authorized representatives of the selected RES and any other third party who need access to the customer-specific information; provide that the RES or any third party will not disclose, use, sell, or provide customer-specific information to any person, firm or entity for any purpose outside of the aggregation program; and, acknowledge that the customer-specific information remains the property of the GA and that breaches of confidentiality will have certain, specified, and sufficient consequences.

This language for Rate GAP is beneficial both for having the GA be well-informed on the risks that lapses in confidentiality protection may engender and the ways these may be averted. In reality, it makes explicit what Section 1-92 (c)(2) reasonable requires. So too, the Commission sees nothing nor has been shown anything in the language proposed by either RESA or ICEA to put ComEd into an untenable position.

We do observe ComEd seeking permission to rework the proposed language such that it would comport with the terminology generally used in its approved tariffs. ComEd states that, in doing so, it is willing to work with Staff and interested parties. It further requests up to ten (10) business days to make this compliance filing. The Commission finds this request to be sound and reasonable and we encourage timely, diligent, and cooperative engagement by the parties.

Finally, RESA and ICEA contend that ComEd's Municipal Aggregation Data Request Form should reflect the language included in Rate GAP. We see no party to object to this specific proposal. Indeed, at an early point, Staff considered language being put into the Municipal Aggregation Data Request Form to be useful in reminding the municipalities of their statutory obligations. The Commission is convinced that adding this language to the Data Request Form is both reasonable and practical and directs ComEd to take such action immediately after its compliance filing.

D. Data Request Fees

(Only Staff, ComEd Dominion and RRES address this issue).

E. Additional Proposed Tariff Modification

1. ICEA's Position

ICEA observes that Revised Sheet of No. 411 of Rate GAP explains the use of "Generic Load Profiles" that are used in Company Obligations section of the tariff. ICEA proposes that ComEd be required to provide customer specific Peak Load Contribution/Network Service Peak Load (PLC/NSPL) information in lieu of Generic Load Profiles. In ICEA's view, the provision of such customer-specific information will better allow suppliers to prepare bids for the governmental authorities for the ultimate benefit of the aggregated customers of the Municipal Authorities.

2. ComEd's Position

3. Commission Analysis and Conclusion

We observe that ComEd opposes ICEA's proposal to have the utility provide Customer-specific Peak Load Contribution/Network Service Peak Load ("PLC/NSPL") information in lieu of generic load profiles. ComEd contends that it is unable to release the customer-specific PLCs for reason that Section 16-122(c) of the PUA prohibits the release of this customer-specific data unless authorization is provided by the customer. The Commission is not persuaded by ComEd's position. Our reading of Section 1-92(c)(2) of the IPA Act shows that it makes reference to Section 16-122(c) of the PUA, in a very particular way. In relevant part, the law states that:

> Notwithstanding Section 16-122 of the Public Utilities Act and Section 2HH on the Consumers Fraud and Deceptive Business Practices Act... 20 ILCS 3855/1-92 (c)(2).

The Commission understands that this language frees ComEd from the restrictions imposed by Section 16-122 and is the basis for the utility's provision of otherwise confidential data. This means that the request put to ComEd by ICEA is permissible under the law. Moreover, we observe ICEA's assertion, that the provision of such customer-specific information will better allow suppliers to prepare bids for the governmental authorities for the ultimate benefit of the aggregated customers of the Municipal Authorities, is undisputed. For these reasons, we conclude that ComEd will revise Revised Sheet of No. 411 of Rate GAP to accommodate ICEA's proposal.

F. Rulemaking Proposals

1. ComEd's Position

2. Staff's Position

3. RESA's Position

4. ICEA's Position

ICEA supports ComEd's view and encouragement of the initiation of a rulemaking proceeding that would bring greater structure and clarity to the operation of municipal aggregation programs. ICEA believes all participants would benefit from having state-wide standards and rules on governmental aggregations. A rulemaking, ICEA asserts, would bring greater definition, clarity, competitive-sensitivity, and a discussion of best practices to the aggregation process providing valuable assistance to the governmental authorities, to the utilities, to RES and, as importantly, to the residential and small commercial customers.

To the extent that the Commission believes it has the authority to initiate a rulemaking, ICEA strongly encourages the Commission to exercise such authority. ICEA recognizes, however, that whether such a rulemaking proceeds under the auspices of the Commission or the IPA or both, is an open question. To this end, ICEA has observed the Commission to recognize the value of coordination and/or exchange of information between different agencies. The instant situation, ICEA argues, suggests itself to be an excellent opportunity for the Commission and the IPA (given its assigned role in municipal aggregation) to share concerns and work together toward the goal of establishing rules and standards pertaining to municipal aggregation. ICEA stands ready to serve as resource for both the Commission and the IPA in moving such a process forward.

5. Commission Analysis and Conclusion

We observe that in their respective comments, ComEd, ICEA, and RESA each encourage the Commission to initiate a rulemaking proceeding. Staff also agrees, in principle, that a rulemaking would assist in developing state-wide standards for the municipal aggregation programs. In particular, Staff informs that a rulemaking would be most beneficial in the situation where a municipality nears the end of its initial aggregation contract and seeks to explore aggregation options after the initial contract ends. This situation, Staff believes, will first arise in year 2013. Its own experience in workshop discussion shows Staff that several novel issues associated with a municipality pursuing a follow-up aggregation program are not addressed in ComEd's Rate GAP but will need to be addressed in some way in the future. Nevertheless, Staff suggests that the statutory authority for such a rulemaking is far from obvious.

Administrative rules are the best way to compensate for any vagueness, incompleteness, or lack of clarity in the law. These proceedings are highly useful in promoting the virtue of uniformity, discussing situational practicalities, and in amply detailing both the rights and responsibilities of all participants. As importantly, rules also bring transparency and build public confidence. Notably, we observe from the arguments set out, in both Dominion's and FES's comments, that such rules have been promulgated for the promotion of governmental aggregation programs in the state of Ohio. Indeed, in the immediate premises FES has asserted that existing consumer protection statutes and rules may not fit neatly in the aggregation context "requiring additional rules or tariff restrictions for this purpose." (FES Reply Comments at 3). In similar respect, FES makes known that it would not object to a rule prohibiting an ARES in receipt of information from using same for its own purposes. For its part, ComEd has expressed concerns regarding its authority to enforce restrictions on the use of data by municipalities. At the same time too, RESA points out that there will be many more municipalities, in both ComEd's and Ameren Illinois Company's ("Ameren") service territories, with opt-out municipal aggregation referenda in the March 2012 elections. All these matters weigh heavily on the Commission.

We understand Staff to state that it will explore the Commission's statutory authority for promulgating rules to implement the provisions of the IPA Act. But, Staff

recommends that the Commission not use this investigation to initiate a new rulemaking. Instead, Staff asks to present its findings to the Commission outside of the instant docketed proceeding.

The Commission agrees with Staff's recommendations. We further will have Staff bring its findings and recommendations on this important matter within 30 days of the date of the entry of the Final Order in the instant proceeding.

IV. FINDINGS AND ORDERING PARAGRAPHS

Respectfully submitted,

THE ILLINOIS COMPETITIVE ENERGY ASSOCIATION

/s/ Eve Moran
Eve Moran
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Dated: February 3, 2012

NOTICE OF FILING

Please take note that on February 3, 2012, I am causing to be filed via e-docket with the Chief Clerk of Illinois Commerce Commission, the attached **ICEA's Suggested Partial Draft Order** in Docket 11-0434.

Dated: February 3, 2012

/s/ Eve Moran
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CERTIFICATE OF SERVICE

I, Eve Moran, attorney for the Illinois Competitive Energy Association, certify that I caused to be served copies of the **ICEA's Suggested Partial Draft Order** upon the parties identified on the service list maintained on the Illinois Commerce Commission's e-Docket system for Docket 11-0434 (consolidated) via electronic delivery, on February 3, 2012.

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